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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Splendor Productions, Inc.

Serial No. 76152209

Ava K. Doppelt of Allen, Dyer, Doppelt, Milbrath & Gilchrist,
P.A.

Brian J. Pino, Trademark Examining Attorney, Law Office 114
(Margaret Le, Managing Attorney).

Before Hohein, Bottorff and Holtzman, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Splendor Productions, Inc. has filed an application to
register the mark "THE MUSIC OF LIFE" and design, as reproduced
below,



for "prerecorded musical products, namely, compact discs and videotapes featuring music."¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles each of the following marks, which are owned by the same registrant for the goods and services indicated, as to be likely to cause confusion, or to cause mistake, or to deceive:

(i) the mark "THE MUSIC OF YOUR LIFE" for "pre-recorded phonograph records and magnetic tapes";² and

(ii) the mark "MUSIC OF YOUR LIFE" for "entertainment services rendered by an orchestra".³

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in

¹ Ser. No. 76152209, filed on October 23, 2000, which is based on an allegation of a bona fide intention to use the mark in commerce. The word "Music" is disclaimed.

² Reg. No. 1,275,953, issued on May 1, 1984, which sets forth a date of first use anywhere of December 23, 1982 and a date of first use in commerce of January 19, 1983; combined affidavit §§8 and 15. The word "MUSIC" is disclaimed.

³ Reg. No. 1,367,083, issued on October 22, 1985, which sets forth a date of first use anywhere and in commerce of January 19, 1983; combined affidavit §§8 and 15. The word "MUSIC" is disclaimed.

Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods and/or services at issue and the similarity or dissimilarity of the respective marks in their entireties.⁴

Turning first to the similarity or dissimilarity in the goods at issue, applicant argues in its main brief that "there is no basis for concluding that the goods and services themselves are similar," asserting that its "goods are for compact discs, which include a four-volume collection of multifarious musical compositions[,] and video tapes" while "[t]he cited registrations are for phonograph records, magnetic tapes and entertainment services rendered by an orchestra" (emphasis in original). Applicant also alternatively argues, in its main brief, that it "is willing to amend the description" of its goods "to read: 'pre-recorded musical products namely, compact disks and video tapes featuring Christian music,'" noting that:

Applicant ... is in the business of retail Christian music sales. As such, sales of the subject goods are intended to be directed to the Christian retail consumer. The [goods and services associated with the] marks upon which the Examining Attorney bases his refusal to register are for general retail sales and are not intended for Christian music sales. General retail sales and Christian music sales are separate and distinct channels of trade, and Applicant

⁴ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks." 192 USPQ at 29.

respectfully submits that this factor weights
in favor of registration of Applicant's Mark.

Applicant, in its main brief, additionally contends that because the "sophistication of consumers desiring to purchase Christian music is generally greater than the average consumer," it is the case that "[t]hose purchasing Christian music often tend to be particular about the specific types and genres that they purchase"; that they "are unlikely to seek their product in the same area that sales made" of registrant's goods; and that "[i]t is more likely that they will carefully scrutinize their purchase so that it conforms to their specific tastes and desires."

However, as the Examining Attorney observes in his brief, applicant's arguments that the respective goods and services are not related because of asserted differences in the channels of trade for the goods and the sophistication of purchasers for the goods and services are not well taken. As the Examining Attorney correctly points out, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods and services as they are set forth in the involved application and the cited registrations, and not in light of what such goods and services are asserted to actually be. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed.

Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

As the Examining Attorney, in view thereof, accurately observes, "applicant's identification of goods does not limit the goods to Christian music, nor does it limit the sale of the goods to Christian music stores." Moreover, as the Examining Attorney properly notes, even if applicant were to amend its application to so limit its goods, the fact remains that registrant's identification of goods, as well as its identification of services, "does not contain any limitation of the type of music it sells [or performs] or to whom the music [or orchestral entertainment] may be sold. Therefore, one must presume that the registrant's goods [and services] include Christian music and are also sold to Christian music stores [and to Christian music listeners]." Furthermore, even if purchasers of and listeners to Christian music could be considered to be careful and discriminating consumers, the Examining Attorney is again correct in noting that, nevertheless, it is well settled that the fact that consumers may exercise deliberation in choosing goods and services in a particular field or genre of music does not necessarily preclude their mistaking one mark for another or that they otherwise are entirely immune from confusion as to source or sponsorship. Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983).

With respect to applicant's contentions that "there is no basis for concluding that the goods and services themselves are similar," it is well established, as the Examining Attorney points out, that the goods and services at issue need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods and services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 595-96 (TTAB 1978) and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In support of his contention that applicant's goods are related to registrant's goods and services, the Examining Attorney has made of record copies of ten use-based third-party registrations in which, in each instance, the same mark is not only registered for various pre-recorded forms of music and musical performances, such as compact discs, audio cassettes, video cassettes and phonograph records, but is also registered for live entertainment services rendered by a musical group, artist or orchestra. Nine other use-based third-party registrations furnished by the Examining Attorney similarly feature a mark which is registered for compact discs, phonograph records, audio cassettes and/or video cassettes. It is settled,

in this regard, that while use-based third-party registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, such registrations may nevertheless have some probative value to the extent that they serve to suggest that the goods and/or services listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988). Here, the registrations noted by the Examining Attorney serve to confirm the obvious, namely, that compact discs, phonograph records, audio cassettes and video cassettes are all forms of pre-recorded music available from or produced by a single source, while those which list both goods and services also demonstrate that musical sound recordings and live musical performances likewise may be regarded by consumers of prerecorded music and musical entertainment services as emanating from a common source. The respective goods and services at issue herein are thus sufficiently related that, if sold or offered under the same or similar marks, confusion as to the origin or affiliation thereof would be likely to occur.

Turning, therefore, to the respective marks, applicant argues in its main brief that confusion is unlikely because the marks "do not look or sound alike, and as such, make different overall commercial impressions." Specifically, applicant urges that (bold in original; citation omitted):

Applicant respectfully asserts that **THE MUSIC OF YOUR LIFE** and **MUSIC OF YOUR LIFE** differ from **THE MUSIC OF LIFE**. Both of the

[cited] references include the word "YOUR" where it is omitted in Applicant's Mark. "YOUR" is a possessive modifier which significantly alters the meaning of the Mark. "YOUR" also results in a different sounding mark when pronounced orally. Furthermore, Applicant asserts that the marks are dissimilar in appearance, as the cited references for **THE MUSIC OF YOUR LIFE** and **MUSIC OF YOUR LIFE** are typed drawings whereas the subject Mark contains highly stylized writing in addition to a piano design. Because the dominant features of Applicant's Mark are the stylized writing and the piano design, "it is proper to give greater face [sic] and effect to that feature for purposes of determining likelihood of confusion."
....

The Examining Attorney, on the other hand, contends that, when considered in their entirety, the respective marks are so substantially similar that, when used in connection with musical sound recordings and musical entertainment services, confusion as to source or sponsorship would be likely to take place. As the Examining Attorney points out in his brief (citation omitted):

The marks are identical in all respects, except for the applicant's piano design and the wording THE and/or YOUR. If the goods or services ... are closely related, as is the case here, the degree of similarity between marks required to support a finding of likelihood of confusion is not as great as would apply with diverse goods or services.
.... The wording YOUR and THE are non-distinctive and do not create a distinct commercial impression that obviates the likelihood of confusion between the marks. Moreover, the applicant's stylization of its mark does not obviate the likelihood of confusion between the marks ... because the registrant's marks are in typed form. Therefore, the registrant may display its mark in any stylization, including the exact stylization that appears in applicant's mark.
.... Additionally, both [applicant and

registrant] ... have disclaimed the wording MUSIC apart from the mark. Thus, the dominant portion of the marks is LIFE; the respective marks share the dominant wording LIFE as the last word in each mark. Accordingly, the positioning of the dominant portion of each mark is the same, leading to the same look and connotation of the respective marks.

In view thereof, and inasmuch as it is also the case that, not only is the piano design in applicant's mark "highly descriptive of the goods, especially if the music includes the piano as an instrument," but the word portion of such mark, namely, "THE MUSIC OF LIFE," is the part which, where a mark consists of a word portion and a design, "is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods,"⁵ the Examining Attorney concludes that confusion is likely.

We agree with the Examining Attorney that contemporaneous use of the marks at issue in connection with the respective goods and services is likely to cause confusion. Admittedly, there are differences between applicant's mark and registrant's marks which are apparent upon a side-by-side comparison. However, as the Examining Attorney correctly observes, such a comparison is not the proper test to be used in determining the issue of likelihood of confusion because it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect

⁵ See, e.g., *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

In the present case, it is apparent that applicant's "THE MUSIC OF LIFE" and design mark is substantially similar to both registrant's "THE MUSIC OF YOUR LIFE" mark and its "MUSIC OF YOUR LIFE" mark in sound, appearance and general overall commercial impression due, in significant part, to the fact that structurally, each prominently features essentially the same or highly similar phrase "(THE) MUSIC OF (YOUR) LIFE". Moreover, contrary to applicant's argument that the stylized wording in its mark renders such mark visually distinct from registrant's typed format marks, it is pointed out that the fact that registrant's marks are in typed form means that the display thereof could include not only the same stylization for the wording therein as utilized by applicant for its mark, but also the same manner of placing the individual words one beneath another rather than on a single line. See, e.g., *Phillips Petroleum Co. v. C. J. Webb, Inc.* 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) [a mark registered in typed format is not limited to the depiction thereof in any special form]; and *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1588 (TTAB 1992) ["[a]s the *Phillips*

Petroleum case makes clear, when [an] applicant seeks a typed or block letter registration of its word mark, then the Board must consider all reasonable manners in which ... [the word] could be depicted"]. The presence, therefore, of a piano design in applicant's "THE MUSIC OF LIFE" and design mark, along with the absence of the possessive word "YOUR," is simply insufficient to distinguish such mark from registrant's "THE MUSIC OF YOUR LIFE" and "MUSIC OF YOUR LIFE" marks. Such marks are substantially similar in sound and appearance, and engender substantially the same general overall commercial impression.

Applicant, nevertheless, further contends in its main brief that "in light of similar marks in use on similar goods [and services]" by third parties, applicant's mark and those of registrant "should be able to co-exist as well."⁶ In particular, applicant asserts that "[t]he Patent and Trademark Office has registered many marks similar to Applicant's that suggest music-related goods or services and require a disclaimer for the word 'MUSIC.'" Applicant lists, as examples thereof, the following four registrations:⁷ (i) "Reg. No. 2,268,522" for the mark

⁶ While applicant additionally urges with respect to registrant's marks that "[n]either of these marks qualify as 'famous' marks and that such factor weighs in favor of Applicant," it is pointed out that there is no evidence of record as to whether registrant's marks are famous. Accordingly, the *du Pont* factor of "[t]he fame of the prior mark[s] (sales, advertising, length of use)" is simply not applicable herein.

⁷ Ordinarily, a mere list of third-party registrations would be insufficient to make such registrations properly of record. The Board does not take judicial notice of third-party registrations, see, e.g., *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974), and thus the proper procedure for making information concerning third-party registrations of record is to submit either copies of the actual registrations or the electronic equivalents thereof, i.e., printouts of the registrations which have been taken from the PTO's own computerized database. See, e.g., *In re Consolidated Cigar Corp.*, 35 USPQ2d 1290,

"MUSIC OF YOUR LIFE" for "entertainment services rendered through the medium of radio, namely music programs"; (ii) "Reg. No. 1,287,892" for "THE MUSIC OF YOUR LIFE" for "printed music folios"; (iii) "Reg. No. 2,158,771" for "LIFE MUSIC" for "pre-recorded compact discs featuring musical arrangements designed to enhance personal well-being and positive mental states and instructional manuals for use therewith, sold as a unit"; and (iv) "Reg. No. 1,914,107" for "MUSIC FOR LIFE" for a variety of "electronic and audio apparatus" including "phonograph and record turntables," and "compact disc players."

Applicant's contention is not persuasive. As the Examining Attorney points out, the registration for the mark "THE MUSIC OF YOUR LIFE" for "printed music folios" is not a third-party registration but, rather, is owned by the same registrant as is the owner of the cited registrations herein, while the registration for the mark "MUSIC FOR LIFE" for a variety of "electronic and audio apparatus" is no longer valid. Moreover, as the Examining Attorney observes "Reg. No. 2,268,522" does not correspond to the mark "MUSIC OF YOUR LIFE" for "entertainment services rendered through the medium of radio, namely music programs" but instead is for the mark "THEAEGIS.COM" for the service of "providing an on-line newspaper featuring general and local news and information," while the mark "LIFE MUSIC" for "pre-recorded compact discs featuring musical arrangements

1292 n. 3 (TTAB 1995); In re Smith & Mehaffey, 31 USPQ2d 1531, 1532 n. 3 (TTAB 1994); and In re Melville Corp., 18 USPQ2d 1386, 1388 n. 2 (TTAB 1991). Nonetheless, because the Examining Attorney treated the third-party registrations as if they were properly of record, we have

designed to enhance personal well-being and positive mental states" projects "a different commercial impression" from that engendered by the marks at issue herein. Furthermore, and most importantly, it is pointed out that the information provided by applicant with respect to what at most amount to three third-party registrations simply does not constitute proof of actual use of any of the registered marks and that the purchasing public, having become conditioned to encountering various goods and services under those marks, is therefore able to distinguish the source thereof based upon differences in such marks. See, e.g., AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) and In re Hub Distributing, Inc., 218 USPQ 284, 285-86 (TTAB 1983). Thus, the number and nature of similar marks in use on similar goods is not a relevant *du Pont* factor in this appeal.

We accordingly conclude that consumers who are familiar or acquainted with registrant's "THE MUSIC OF YOUR LIFE" mark for "pre-recorded phonograph records and magnetic tapes" and its "MUSIC OF YOUR LIFE" mark for "entertainment services rendered by an orchestra" would be likely to believe, upon encountering applicant's substantially similar "THE MUSIC OF LIFE" and design mark for "prerecorded musical products, namely, compact discs and videotapes featuring music," that such closely related goods and services emanate from, or are sponsored by or affiliated with, the same source. Even those consumers, for example, who happen to notice the minor differences between applicant's mark for its

considered the information furnished by applicant with respect

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goods and registrant's marks for its goods and services could reasonably believe that applicant's goods constitute a new product line from the same source as registrant's goods and services.

Decision: The refusal under Section 2(d) is affirmed.

thereto.